(5)

No. 00-262-CSY Title: Arkansas, Petitioner
v.
Kenneth Andrew Sullivan

Docketed: August 16, 2000 Court: Supreme Court of Arkansas

Entry	Date	Proceedings and Orders
	Aug 16 2000	Petition for writ of certiorari filed. (Response due November 29, 2000)
	Sep 27 2000	DISTRIBUTED for Conference of October 13, 2000
	Oct 6 2000	Response requested. (Due November 7, 2000)
	Nov 16 2000	Order extending time to file response to petition until November 29, 2000.
	Nov 29 2000	Brief of respondent Kenneth A. Sullivan in opposition filed.
	Nov 29 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Dec 13 2000	REDISTRIBUTED for Conference of January 5, 2001
	Apr 25 2001	REDISTRIBUTED for Conference of April 27, 2001
	May 7 2001	REDISTRIBUTED for Conference of May 10, 2001
	May 14 2001	REDISTRIBUTED for Conference of May 17, 2001
	May 21 2001	REDISTRIBUTED for Conference of May 24, 2001
	May 29 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	May 29 2001	Petition GRANTED. Judgment REVERSED and case REMANDED Concurring opinion by Justice Ginsburg, with whom Justice Stevens, Justice O'Connor, and Justice Breyer join. Opinion per curiam. (Detached opinion.)
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	Jun 28 2001	MANDATE ISSUED.

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(1) Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS, *Petitioner,*

V.

KENNETH ANDREW SULLIVAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

MARK PRYOR
Arkansas Attorney General

BY: **DAVID R. RAUPP**
Senior Assistant Attorney General
***VADA BERGER**
Assistant Attorney General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-1052

**Counsel of Record*

30pp

QUESTION PRESENTED

Is the Arkansas Supreme Court bound by this Court's precedent holding that ulterior motives of police play no role in ordinary Fourth Amendment probable-cause analysis?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT:

I. The Arkansas Supreme Court Erred By Concluding That Ulterior Motives Of Police Play A Role In Ordinary Fourth Amendment Probable-Cause Analysis And By Holding That It Was Not Bound By This Court's Fourth Amendment Precedent 6

CONCLUSION 8

APPENDIX:

Slip opinion in *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) A-1

Supplemental slip opinion on denial of
rehearing in *State v. Sullivan*, 340 Ark. 318-A,
16 S.W.3d 551 (2000) A-6

TABLE OF AUTHORITIES

CASES **Page**

Atwater v. City of Lago Vista, 195 F.3d 242
(5th Cir. 1999)(en banc), *cert. granted*,
120 S. Ct. 2715 (2000) 4

California v. Beheler, 463 U.S. 1121
(1983)(per curiam) 7

Cooper v. Aaron, 358 U.S. 1 (1958) 7

Maryland v. Dyson, 527 U.S. 465 (1999)(per curiam) 7

Oregon v. Hass, 420 U.S. 714 (1975) 7

State v. Sullivan, 340 Ark. 315,
11 S.W.3d 526 (2000) 1

State v. Sullivan, 340 Ark. 318-A,
16 S.W.3d 551 (2000) 1

United States v. Robinson, 414 U.S. 218 (1973) 7

Whren v. United States, 517 U.S. 806 (1996) 4, 5, 6, 7

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the United States
Constitution 1, 3, 6

STATUTES

28 U.S.C. § 1257(a) 1

Arkansas Code Annotated § 5-4-401(b)(Repl. 1997) 4

Arkansas Code Annotated § 5-73-120(a)(Repl. 1997) 4

Arkansas Code Annotated § 5-73-120(d)(Repl. 1997) 4

Arkansas Code Annotated § 27-37-306(b)(1) (Supp. 1999) 4

Arkansas Code Annotated § 27-37-306(g)(Supp. 1999) 4

RULES

Arkansas Rule of Criminal Procedure 4.1(a)(iii)(2000) 3

OTHER AUTHORITIES

1 W. LaFave, *Search and Seizure* (3rd ed. Supp. 1999) 6

The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinions of the Arkansas Supreme Court are reported at 340 Ark. 315, 11 S.W.3d 526, and 340 Ark. 318-A, 16 S.W.3d 551. Appendix at A-1 to A-15.

JURISDICTION

In the State's interlocutory appeal, the Arkansas Supreme Court affirmed the circuit court's decision granting respondent's motion to suppress in an opinion delivered on February 10, 2000. Appendix at A-1 to A-5. That court subsequently denied the State's petition for rehearing in a supplemental opinion delivered on May 18, 2000. Appendix at A-6 to A-9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 18, 1998, Officer Joe Taylor of the Conway, Arkansas, Police Department pulled in behind respondent's Ford Bronco at a gas station after he noticed that the tint on its window was too wide and radar indicated that respondent was driving 40 miles per hour in a 35 mile-per-hour zone. (R. 38-41, 70) He approached respondent, told him why he was being contacted, and asked him for his driver's license, vehicle registration, and proof of insurance. (R. 41) After seeing respondent's license, Officer Taylor realized that he had information that respondent allegedly was involved in drug activity. (R. 51, 68) In response to the officer's requests, respondent stated that his speedometer cable was broken, and he could not produce proof of insurance or a vehicle registration. (R. 42) Moreover, when respondent opened the door to the Bronco, Officer Taylor noticed a hatchet on the floorboard between the driver's door and the seat. (R. 42) Officer Taylor then arrested respondent for improper window tinting, driving an unsafe vehicle, speeding, carrying a weapon, and having no insurance or vehicle registration. (R. 43, 46) Officer Taylor called for another officer to transport respondent. (R. 43)

Once respondent was in the back of the other officer's car, Officer Taylor began an inventory search of the Bronco in accordance with the Conway Police Department's Vehicle Inventory Policy. (R. 43, 44) The officer first picked up the hatchet, which had corroded onto the carpeting beneath it. (R. 43) Under the armrest, Officer Taylor found a black bag. (R. 43) In the bag, Officer Taylor found a Ziploc bag containing ten bags of what appeared to be methamphetamine, as well as "27 corners of plastic bags, a small plastic container with suspected marijuana, a zip-lock bag with bag corners inside of it," and a plastic container with two bags of suspected methamphetamine. (R. 44) In a zippered pocket of the black bag, Officer Taylor also found two bags containing what

appeared to be methamphetamine, a plastic tube and a wood-handled knife with white powdery residue on them, a red metal plate, and a purple plastic straw. (R. 44)

As a result of the detention and search, respondent was charged with possession of methamphetamine with intent to deliver, attempt to manufacture methamphetamine, possession of drug paraphernalia, carrying a weapon, and speeding. (R. 3) Before trial, respondent filed a motion to suppress the evidence seized from his Bronco claiming, among other things, that his Fourth Amendment rights had been violated. (R. 18-19) In particular, he argued that Officer Taylor "stopped" his Bronco "as a pretext and sham to search" him and that his subsequent arrest also was "pretextual[.]" (R. 18-19) After conducting a hearing on respondent's motion, the circuit court granted it. Although it concluded that the initial seizure for speeding was lawful, it held that respondent's arrest was illegal because the officer arrested him only after recognizing him "as someone that he had seen intelligence on regarding narcotics[.]" (R. 81)

The State pursued an interlocutory appeal of the circuit court's decision to the Arkansas Supreme Court. In an opinion issued on February 10, 2000, that court affirmed the suppression order. Appendix at A-5. The court decided the case by examining whether respondent's arrest was pretextual. Appendix at A-3 to A-4. It then went on to hold that the circuit court did not clearly err by concluding that the arrest was, in fact, pretextual because it was "doubtful[ ]" that Officer Taylor would have arrested respondent "simply" for speeding and possessing a hatchet.[1] Appendix at A-4.

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[1]Respondent never argued, and the court did not hold, that arresting a driver on probable cause for committing a fine-only traffic violation infringes the driver's Fourth Amendment rights, although Arkansas law permits such arrests. *See, e.g.*, Arkansas Rule of Criminal Procedure 4.1(a)(iii)(2000)(authorizing an officer to arrest

The State petitioned for rehearing, arguing that the court's opinion contained a significant error of law by taking into account the officer's ulterior motives in disregard of this Court's opinion in *Whren v. United States*, 517 U.S. 806 (1996). In a supplemental opinion delivered on May 18, 2000, the Arkansas Supreme Court denied the State's petition. Appendix at A-6. The court first noted its disagreement with the State's reading of *Whren*, stating that *Whren* does not authorize a police officer to "arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime." Appendix at A-6. Indeed, it apparently read *Whren* as holding that "probable cause of a traffic violation" permits only a stop, not an arrest. Appendix at A-8. In the alternative, the court held that, if *Whren* did permit pretextual arrests, it was not bound by *Whren* because "there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." Appendix at A-9.

Three of the court's seven justices dissented from the decision denying the State's petition for rehearing. Appendix at A-10 to A-15. The dissenters concluded that, because Officer Taylor had probable cause to arrest respondent for numerous traffic violations, he had authority to conduct an inventory search

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a person without a warrant for any violation of the law in the officer's presence). Moreover, respondent's carrying a weapon and operating the Bronco with improper tinting were jailable offenses for which he was arrested. (R. 46) *See* Ark. Code Ann. § 5-4-401(b)(Repl. 1997) (misdemeanor offenses); Ark. Code Ann. § 5-73-120(a) & (d)(Repl. 1997)(carrying a weapon); Ark. Code Ann. § 27-37-306(b)(1) & (g)(Supp. 1999)(window tinting). Consequently, this case does not present the question presented by *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999)(en banc), *cert. granted*, 120 S. Ct. 2715 (2000).

of respondent's Bronco. Appendix at A-11 to A-12. They did not take exception, however, to the majority's statement that the court had the power to read the United States Constitution more broadly than this Court. The State asked the court to recall the mandate, noting that it would seek summary reversal in this Court. On June 8, 2000, the court granted the State's motion.

REASONS FOR GRANTING THE WRIT

I. The Arkansas Supreme Court Erred By Concluding That Ulterior Motives Of Police Play A Role In Ordinary Fourth Amendment Probable-Cause Analysis And By Holding That It Was Not Bound By This Court's Fourth Amendment Precedent.

The Arkansas Supreme Court's holding in this case – that an arrest supported by probable cause nevertheless violates the Fourth Amendment if police have an improper motive – directly conflicts with this Court's holding in *Whren*. In *Whren*, this Court unanimously held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. The Arkansas Supreme Court apparently thought that this language was *dictum* and that *Whren* only supports the proposition that the stop of an automobile does not violate the Fourth Amendment when an officer has probable cause to believe that a traffic violation has occurred. Appendix at A-8. The court, however, was wrong.

1. *Whren* reaffirmed that police officers do not run afoul of the Fourth Amendment by stopping an automobile when they have probable cause to believe that a traffic violation has occurred. *Id.*, 517 U.S. at 810. What *Whren* also answered, but the Arkansas Supreme Court ignored, is whether the existence of probable cause is somehow vitiated by an officer's allegedly improper motive. The Court unequivocally answered this question, "no." *Whren*, 517 U.S. at 813; *see also* 1 W. LaFave, *Search and Seizure* § 1.4(e), at 8 (3rd ed. Supp. 1999)(stating that the "effect of *Whren*, then, is that . . . the pretext doctrine has disappeared from Fourth Amendment jurisprudence . . .."). That *Whren* involved the propriety of a traffic stop, instead of an arrest, is of no moment. Indeed, that is a distinction that *Whren* itself forecloses. In *Whren*, the Court

stated that it had previously held in *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973), that "a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search[.]'" *Whren*, 517 U.S. at 813. The stop in *Whren* was for traffic violations, *id.*, at 809-10, and the stop and arrest here are of the same sort. Consequently, the Court should grant the State's petition and summarily reverse the decision of the Arkansas Supreme Court. *See, e.g., California v. Beheler*, 463 U.S. 1121, 1121-22 (1983)(per curiam)(summarily reversing when question "settled clearly" by Court's past decisions).

2. Not only did the Arkansas Supreme Court err by misreading *Whren*, but it compounded its error by concluding that, even if *Whren* compelled the conclusion urged by the State, "there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." Appendix at A-9. To the contrary, it is axiomatic that the Arkansas Supreme Court is bound by this Court's interpretation of the United States Constitution, *see, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958), even if that court's interpretation allegedly has the effect of providing greater safeguards to individual rights. *E.g., Oregon v. Hass*, 420 U.S. 714, 719 & n.4 (1975)(stating that "a State may not impose such greater restrictions [on police activity] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."). This Court should grant the State's petition and summarily reverse the Arkansas Supreme Court's decision in order to correct that court's "demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999)(per curiam).

CONCLUSION

For the reasons and authorities set forth above, the State of Arkansas respectfully requests that the petition for a writ of certiorari be granted and that the decision of the Arkansas Supreme Court be summarily reversed.

Respectfully submitted,

MARK PRYOR
Arkansas Attorney General

BY: **DAVID R. RAUPP**
Senior Assistant Attorney General
***VADA BERGER**
Assistant Attorney General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-1052

**Counsel of Record*

APPENDIX

SUPREME COURT OF ARKANSAS
No. CR 99-1140

Opinion Delivered FEB 10 2000

STATE OF ARKANSAS, APPELLANT,	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT,
VS.	NO. CR-98-732, HON. CHARLES EDWARD
KENNETH ANDREW SULLIVAN, APPELLEE,	CLAWSON JR, JUDGE

AFFIRMED.

W.H. "DUB" ARNOLD, Chief Justice

The State brings this interlocutory appeal from the trial court's granting of appellee's motion to suppress evidence found in his vehicle after an officer observed him speeding. Appellee was approached by a Conway police officer, Joe Taylor, for allegedly traveling 40 miles per hour in a 35 mile-per-hour zone on Highway 65 in Conway. Although Officer Taylor did not use his "blue lights" to require appellee to stop, appellee pulled into a service station and was then informed by Officer Taylor of the reason for the contact.

Appellee was requested by Officer Taylor to produce registration and proof of insurance. When appellee, a now-disabled, previously self-employed roofer, opened his vehicle door to locate the documents requested, Officer Taylor noticed a rusted roofing hatchet that was corroding into the carpet of the vehicle. Appellee was unable to locate his vehicle registration and proof of insurance. He was then arrested for

speeding, having no vehicle registration and no proof of insurance, and carrying a weapon (the roofing hatchet), as well as having an improper tint on his windshield. Officer Taylor further deemed appellee's vehicle to be unsafe because his speedometer was not working properly.

After another officer arrived and placed appellee in the back of his police unit, Officer Taylor began an inventory search of appellee's automobile. Officer Taylor testified that under the armrest, he found a black bag with what appeared to be methamphetamine inside it. The bag, he claims, contained a Ziploc-type bag with ten individually-wrapped bags of the substance, twenty-seven corners of plastic bags, a small plastic container with suspected marijuana, another Ziploc-type bag with bag corners inside of it, and a plastic container with two bags of suspected methamphetamine. Officer Taylor also stated that a zippered pocket of the same black tote bag contained two bags of suspected methamphetamine, a plastic tube with white powdery residue in it, a wood-handled knife with white powdery residue on the ends, and a red metal plate and a purple plastic straw. Appellee was then charged with the following offenses: possession of methamphetamine with intent to deliver; attempt to manufacture methamphetamine; possession of drug paraphernalia; unlawful possession of a weapon, the roofing hatchet; and speeding. He was not charged with having no proof of insurance or vehicle registration.

Appellee moved to suppress evidence seized from his vehicle on the basis that the stop was a pretext to conduct a search. Upon the testimony of the sole witness at the suppression hearing, who was Officer Joe Taylor, as well as arguments of counsel, the trial court deliberated overnight and then granted appellee's motion to suppress, from which the State now brings this appeal. For its only point on appeal, the State asserts that the trial court erred in granting appellee's motion to

suppress evidence found in his vehicle. We disagree with the State and affirm the trial court.

This Court, upon review of a trial court's ruling on a motion to suppress, makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling is against the preponderance of the evidence. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998). The issue before this Court is whether the search of appellee's vehicle was justified, either as an inventory search or as a search incident to arrest. We hold that it was not.

In the instant case, Officer Taylor was the sole witness who testified at the hearing on appellee's motion to suppress. Although he testified on direct examination that what he conducted was merely an inventory search as dictated by policy and not a search conducted after a traffic stop predicated on suspicions he had of the appellee's involvement in drug activity, he did admit on cross-examination that he had been assigned to the narcotics section and that said section had intelligence on the appellee of which Officer Taylor was aware. Appellee contends that the very facts and circumstances surrounding the arrest itself proves that it was pretextual in nature, in that it was made solely for the purpose of searching the appellee's vehicle for controlled substances, and that, as a result, he is entitled to an order suppressing any and all evidence seized from his vehicle. Appellee asserts that the arresting officer had no reasonable basis to believe that the roofing hatchet was to be used as a weapon.

We have held that "pretext" is a matter of the arresting officer's intent, which must be determined by the circumstances of the arrest. *Brenk v. State*, 311 Ark. 570, 847 S.W.2d 1 (1993). We held in *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986), and the Court of Appeals followed in *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993):

Claims of pretextual arrest raise a unique problem in law deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically, the more serious crime, where the police have a dual motive in making an arrest. What might be termed the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent.

It is settled law that a search may be pretextual when a stop or an arrest is shown to be merely ostensible, a pretense to mask an underlying desire to search and seize suspected contraband. *United States v. Lefkowitz*, 285 U.S. 452 (1932).

The question then becomes whether appellee would have been *arrested* simply for traveling 40 miles per hour in a 35 mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, appellee was never *charged* with having no proof of insurance or vehicle registration. Further, the trial court, when assessing the credibility of Officer Taylor (the sole witness at the hearing), the totality of the circumstances, and the applicable law, agreed with appellee that the search and seizure was pretextual and should be suppressed. Clearly, a review of the applicable law illustrates that the issue of pretext necessarily turns on the facts in a given case, and given our standard of review in these cases,

we cannot say that the trial court's ruling was against the preponderance of evidence.

Affirmed.

SUPREME COURT OF ARKANSAS
No. CR 99-1140

STATE OF ARKANSAS,

APPELLANT,

VS.

KENNETH ANDREW SULLIVAN,

APPELLEE,

Opinion Delivered MAY 18, 2000

PETITION FOR REHEARING

DENIED.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

W.H. "DUB" ARNOLD, Chief Justice

The State has petitioned for rehearing in this case, contending that this court's opinion delivered on February 10, 2000, *State v. Sullivan*, 340 Ark. 315, ___ S.W.3d ___ (2000), contained a significant error of law. The State argues that this court's analysis of the present case using the concept of "pretext" is contrary to the United States Supreme Court's opinion in *Whren v. United States*, 517 U.S. 806 (1996). The State presents us with the *Whren* case for the first time on rehearing and argues that under *Whren*, a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime.

We do not read *Whren* as going as far as the State would have it. In *Whren*, the police officers observed youthful occupants at night in a vehicle with temporary license plates.

The youths were acting suspiciously in a high crime area. When the vehicle did a U-turn and sped off at an unreasonable speed, the police officers gave chase and stopped the vehicle. One of the police officers approached the vehicle and saw two bags of crack cocaine in the driver's hands.

These facts are very different from those in the case before us. Here, the police officer stopped Sullivan for speeding, arrested him primarily because he had a roofing hatchet on the floor of his vehicle which had rusted into the carpet, and then conducted an inventory search following the arrest. As the trial court found in its ruling:

> [F]ollowing our hearing yesterday, I have gone over the testimony and looked at what I believe to be the law in that case, and it's going to be my decision in this particular instance that based on the testimony, specifically that the officer testified that he stopped the car based on a charge of suspicion of speeding—which I have no problem with the stop. I think that was . . . there was radar. I don't have any problem with that.
>
> He testified that once he got him stopped, he recognized him as someone that he had seen intelligence on regarding narcotics, and he—rather than write citations, he physically arrested him. And the weapons charge, I think, was added to that. And I don't believe that in this particular instance that the—that that was appropriate, and I'm going to grant the defendant's motion to suppress the evidence seized as a result of that search.

The State argues that under *Whren*, the Supreme Court has determined that the ulterior motives of police officers are irrelevant so long as there is probable cause for the traffic stop. Admittedly, the decision in *Whren* is broadly written, but much of it is *dicta*. Nevertheless, we do not interpret *Whren* as blanket authority for pretextual arrests for purposes of a search in all cases. Rather, the reasonableness of the arrest and search must be governed by the facts of each case. For example, we do not believe that *Whren* goes so far as to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.

Several jurisdictions, after the *Whren* decision, have refused to give total authority to law enforcement for pretextual arrests and the resulting searches, either because of state constitutions or because the search and seizure was unreasonable. *See, e.g., State v. Ladson*, 979 P.2d 833 (Wash. 1999); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998); *People v. Dickson*, 690 N.Y. Sup. Ct. 2d 390, 180 Misc. 2d 113 (1998); *State v. Gonzalez-Gutierrez*, 927 P.2d 776 (Ariz. 1996). Further, one jurisdiction has questioned the ultimate absurdity of whether *Whren* was meant to sanction arrests and searches incident to a parking violation. *See State v. Holmes*, 569 N.W.2d 181 (Minn. 1997).

This court has cited *Whren* in two cases. *See Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). Neither case dealt with the issue of pretextual arrests but rather cited *Whren* for the proposition that probable cause of a traffic violation is all that is required for a police officer to make a stop. In fact, in *Travis*, we specifically noted that the argument of a pretextual arrest had not been made.

Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more stringent requirements for nighttime searches than Court decisions. *See* Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

In sum, we will not give *carte blanche* approval for all pretextual arrests for traffic violations, as the State would have us do. We draw a clear distinction between arresting a person with crack cocaine in his hands as was the case in *Whren* and effecting a pretextual arrest for purposes of a search, such as we have in the instant case. Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment. *See State v. Holmes, supra*. We will decide the reasonableness of the arrest and search on a case-by-case basis, as the *Whren* decision makes clear. For these reasons, we deny the State's petition for rehearing.

Denied.

CORBIN, BROWN, and THORNTON, JJ., join.

GLAZE, IMBER, and SMITH, JJ., would grant rehearing.

SUPREME COURT OF ARKANSAS
No. CR 99-1140

STATE OF ARKANSAS,

APPELLANT,

VS.

KENNETH ANDREW SULLIVAN,

APPELLEE.

Opinion Delivered MAY 18, 2000

PETITION FOR REHEARING

DISSENTING OPINION WHICH WOULD GRANT REHEARING AND REVERSE THE TRIAL COURT

TOM GLAZE, Associate Justice

The State petitioned for rehearing in this case, arguing that our decision rendered on February 10, 2000, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), contained a significant error of law in failing to mention *Whren v. United States*, 517 U.S. 806 (1996). It is true that our opinion did not discuss *Whren*, but only because that case was neither cited nor argued to this court. I agree with the majority court that the *Whren* decision is significant to our reaching a correct holding in the present case; thus, our court considers it now.[1]

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[1]The State also failed to cite or argue Arkansas cases *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), or *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). However, the *Travis*, *Burris*, and *Whren* cases are relevant to the search, seizure, and arrest issues raised at trial and on appeal and require this court to consider them.

As our court set out in its original opinion, the evidence was indisputable that police officer Joe Taylor made a proper stop of Kenneth Sullivan's car because Sullivan was speeding. Sullivan also had no insurance, vehicle registration, or functional speedometer, and his car windows were improperly tinted. The officer additionally observed a hatchet on the driver's floorboard. The officer advised Sullivan that he was being placed under arrest for these infractions and for driving an unsafe car. He put Sullivan in the back of another officer's car and began inventorying Sullivan's vehicle. In the search, the officer found methamphetamine and marijuana. In making the inventory search, Taylor testified that he followed his department's policy and procedural manual. In these circumstances, Officer Taylor had probable cause to believe Sullivan committed a traffic offense at the time of the stop. That valid stop resulted in the discovery of other violations of the law that permitted Taylor to arrest Sullivan and inventory his car, where the officer found illegal drugs.

Recently, in *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), our court upheld the stop of a defendant's truck for committing a traffic offense—failing to display expiration-date stickers. After the stop, the officer discovered that the driver of the truck had a suspended driver's license, and the passenger, defendant, was a felon who also had no valid license. The officer had the truck towed. When the officer later opened the door of the truck, he found a rifle which led to the defendant's arrest for being a felon in possession of a firearm. At trial, the defendant argued that no probable cause existed for the officer to stop his truck because the officer wrongly believed the Texas license plate was required to display an expiration sticker. Citing *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997), and *Whren v. United States*, 517 U.S. 806 (1996), the *Travis* court rejected the defendant's argument and upheld the search of defendant's truck, holding that it is well settled that an officer may stop and detain a motorist where the officer has probable cause to believe

a traffic violation had occurred. Furthermore, in reaching its decision, the *Travis* court repeated the rule in *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), that, in assessing the existence of probable cause, our review is liberal rather than strict. To the same effect, *see Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). In the present case, once the officer made a valid stop and arrested Sullivan for the numerous traffic violations, including driving an unsafe vehicle, the officer had the authority to perform an inventory of Sullivan's vehicle.

It has been suggested that the State's argument on rehearing is that a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime. To the contrary, the State set out its contention as follows:

> The relevant inquiry, thus, is not whether the officer had an ulterior motive for stopping the vehicle, but whether the officer had probable cause to believe that the defendant was committing a traffic offense at the time of the initial stop. *Travis, supra*; *Burris, supra*. Based on his radar detection of [Sullivan's] speed, the officer here unquestionably had probable cause to stop [Sullivan]. This Court, thus, applied the wrong standard when it decided this case based on its view that the officer stopped appellee based on an ulterior motive. Even if the officer had an ulterior motive, which the State does not admit, it is not to be taken into account by this Court, according to *Whren*, because the stop was unquestionably proper. The Court should grant rehearing to consider this case in the light of *Whren, Travis,* and *Burris*.

It has been further suggested that Officer Taylor had arrested Sullivan primarily because he had a roofing hatchet in

the floor of his vehicle; however, even if the trial court believed this to be true, Taylor still had probable cause to detain and arrest Sullivan for the numerous traffic offenses he had committed. It appears that the judge got off track by injecting his personal view as to whether a hatchet could be a weapon for which he could be arrested for possession. The judge mused, "I've got a hammer under the seat of my car today. Am I subject to being arrested and taken physically into custody because I have a hammer?" With all due respect to the trial judge, the issue, as stated above, is not whether the hatchet, alone, was cause for an arrest after the stop, but whether Sullivan had committed traffic violations in Officer Taylor's presence. Unquestionably, such violations occurred.

In sum, because Sullivan was speeding, had no insurance or vehicle registration, a non-working speedometer, illegally tinted windows, and an unsafe vehicle, the officer had the right to place (and did place) Sullivan under arrest. Sullivan's arrest was valid under Ark. R. Crim. P. 4.1(a)(iii)(1999), which states that "a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed . . . *any* violation of the law in the officer's presence." (Emphasis added.) Pursuant to this rule, a law enforcement officer is authorized to arrest a person for minor traffic violations witnesses by the officer, such as speeding. *See State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998); *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997). The officer's arrest of Sullivan was, therefore, valid. These violations being found also allowed Taylor to make an inventory search that quickly led to the discovery of illegal drugs. *See* Ark. R. Crim. P. 12.6(b)(1999) (a vehicle impounded in consequence of any arrest, or retained in official custody for other cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents). The trial court did not find, nor did Sullivan prove,

that the inventory search was conducted in bad faith for the sole purpose of collecting evidence.

The majority opinion on rehearing hypothecates that the Supreme Court's *Whren* case does not go so far as to sanction conduct where a police can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity. Of course, I agree *Whren* does not allow such a stop and search, but those are not the facts before this court. It is uncontroverted that, at the time of the stop, Officer Taylor did not know the driver was Sullivan. Once again, even the trial court found no pretextual stop, and ruled the stop valid. Under the circumstances of this case, Sullivan's criminal record simply cannot be utilized to his advantage at the time of his stop and arrest.

The majority court validates the stop in this case, but finds Sullivan's arrest pretextual. Again, Sullivan's violation of numerous traffic offenses justified his arrest, and I am unaware of any rule or law that requires an officer merely to issue citations in a traffic stop where numerous violations occurred. Furthermore, I find nothing in the record that the officer could not arrest the violator. While it is true that Officer Taylor, after the stop, recognized Sullivan as a person who had been involved in illegal drugs, surely this fact should not be employed by our court to hold Sullivan's arrest invalid. Labeling Sullivan's arrest illegal when so many other violations justified it fails to comport with the law.

In fact, Supreme Court jurisprudence dictates a contrary result. In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the court dismissed the argument that an ulterior motive might strip law enforcement officers of their legal justification to undertake a search. The Court likewise held that a traffic-

violation arrest would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search." *United States v. Robinson*, 414 U.S. 218 (1973). Summarizing these and other cases in *Whren*, Justice Scalia wrote, "[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813.

For the above reasons, I would hold that the trial court erred and would overturn its ruling. The majority court's failure to do so will generate considerable confusion among the rank and file of law enforcement, the bench, and the bar alike. Its decision is unquestionably a departure from search and seizure law as the Supreme Court has heretofore defined it.

IMBER and SMITH, JJ., join this dissenting opinion.

(2)

No. 00-262

IN THE
United States Supreme Court

STATE OF ARKANSAS,

Petitioner,

v.

KENNETH ANDREW SULLIVAN,

Respondent.

ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

JOHN WESLEY HALL, JR.*
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

DAVID M. SIEGEL
New England School of Law
154 Stuart Street
Boston, Massachusetts 02116
(617) 422-7270
Attorneys for Respondent
**Counsel of Record*

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QUESTIONS PRESENTED

1. **Is the decision of the Arkansas Supreme Court, that the absence of probable cause for a motorist's pretextual arrest rather than being cited renders the inventory of his vehicle unreasonable, based on an adequate and independent state ground for the judgment?**

2. **Does a pretextual warrantless arrest for a non-jailable minor traffic offense violate the Fourth Amendment?**

3. **Does a pretextual vehicle inventory violate the Fourth Amendment?**

TABLE OF CONTENTS

Table of Authorities iv

Rules Involved 2

STATEMENT OF THE CASE 2

A. Respondent's version of the facts 2
B. The officer's absolute discretion in Arkansas to convert a citable stop for a non-jailable traffic offense into full custodial arrest. 5
C. The trial court's holding and the Arkansas Supreme Court's affirmance 6
D. How *Whren v. United States* came into the case on rehearing 7

REASONS FOR DENYING THE WRIT 10

I. The Decision of the Arkansas Supreme Court, However Inartfully Stated, Is Based on Adequate and Independent State Grounds in Interpreting State Law; Certiorari Should Thus Not Be Granted. 10

II. As Decided by the Arkansas Supreme Court, this Case Does Not Implicate *United States v. Whren*, and Thus Certiorari Should Not Be Granted. 13

III. Summary Reversal Is Unwarranted Because of the Nature of the Issues; Instead, If the Court Grants Certiorari at All, it Should Include the Issues Presented by Respondent. 16

REASONS FOR GRANTING THE WRIT 17

I. A Pretextual, Warrantless Arrest for a Non-Jailable Traffic Violation Violates the Fourth Amendment, So Certiorari Should Be Granted and this Case Decided in Light of *Atwater v. City of Lago Vista*. 17
A. Granting Unbridled Discretion to a Law Enforcement Officer to Make a Custodial Arrest to Facilitate an Inventory Search is Unreasonable under the Fourth Amendment. 20
1. The officer's suppression hearing testimony as to his discretion 20
2. The Fourth Amendment's reasonableness inquiry 20
3. This Court's distrust of unbridled discretion in law enforcement officers 22
B. *Whren*, *Atwater*, and absolute discretion. 23
C. Thus, Ark. R. Crim. P. 4.1(a)(iii) violates the Fourth Amendment. 24

II. The Court Has Previously Recognized in Dicta That a Vehicle Inventory May Be Pretextual, and, If Certiorari Is Granted, the Court Should Hold Pretextual Inventories Unreasonable. 24
A. The Court Has Repeatedly Suggested That a Vehicle Inventory Done Merely as a Pretext for a General Investigation of Crime Might Violate the Fourth Amendment. 24
B. The Trial Court's Finding of Fact That the Arrest Occurred to Facilitate the Inventory Is Entitled to Deference on Appeal and Certiorari. 25

CONCLUSION 27

APPENDIX 1-A

Ark. R. Crim. P. 4.1 ..... 1-A
Ark. R. Crim. P. 16.2 ..... 1-A

TABLE OF AUTHORITIES

Cases:

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 21

Atwater v. City of Lago Vista, No. 99-1408 ..... 1, 2, 17, 18, 19, 23, 26, 27

Cady v. Dombrowski, 413 U.S. 433 (1973) 21

Camara v. Municipal Court, 387 U.S. 523 (1967) 21, 22

Carpenter v. State, 36 Ark. App. 211, 821 S.W.2d 51 (1991) 11

City of Indianapolis v. Edmunds, 531 U.S. __, ___ (slip op. at 13), 2000 WL 1740936, 2000 U.S. Lexis 8084 (No. 99-1080; Nov. 28, 2000) 14, 22, 28

City of Seattle v. Mesiani, 110 Wash.2d 454, 755 P.2d 775 (1988) 16

Colorado v. Bertine, 479 U.S. 367 (1987) 24, 25, 26, 27

Delaware v. Prouse, 440 U.S. 648 (1979) 14, 21, 23

Donovan v. Dewey, 452 U.S. 594 (1980) 22

Florida v. Jimeno, 500 U.S. 248 (1991) 21

Florida v. Wells, 495 U.S. 1 (1995) 25, 26, 27

Fouse v. State, 337 Ark. 13, 989 S.W.2d 146 (1999) 11

Garner v. State, 307 Ark. 353, 820 S.W.2d 446 (1991) 9, 10, 11, 13

Griffin v. Wisconsin, 483 U.S. 868 (1987) 21

Hall v. State, 302 Ark. 341, 789 S.W.2d 456 (1990) 11

Illinois v. Lafayette, 462 U.S. 640 (1983) 26

Katz v. United States, 389 U.S. 347 (1967) 21

Knowles v. Iowa, 525 U.S. 113 (1998) 26

Langley v. State, 66 Ark. App. 311, 990 S.W.2d 575 (1999) 11

Marshall v. Barlows, Inc., 436 U.S. 307 (1978) 22

Michigan v. Long, 463 U.S. 1032 (1983) 4

Mincey v. Arizona, 437 U.S. 385 (1978) 22

New York v. Belton, 453 U.S. 454 (1981) 26

New York v. Burger, 482 U.S. 691 (1987) 22, 25

Ornelas v. United States, 517 U.S. 690 (1996) 26

People v. Dickson, 180 Misc.2d 113, 690 N.Y.S.2d 390 (N.Y. County 1998) 16

Richardson v. State, 314 Ark. 512, 863 S.W.2d 572 (1993) 11

Robinette v. Ohio, 419 U.S. 33 (1996) 17

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) 22

State v. Broadway, 269 Ark. 215, 599 S.W.2d 721 (1980) 11

State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922) 16

State v. Holmes, 569 N.S.2d 181 (Minn. 1997) 15, 18

State v. Ladson, 138 Wash. 2d 343, 979 P.2d 833 (1999) 15, 16

State v. Martinez, 306 Ark. 353, 811 S.W.2d 319 (1991) 11

State v. Sullivan, 340 Ark. 315, 11 S.W.3d 526 (2000) 7, 8, 25, 26

State v. Sullivan, 340 Ark. 315, 11 S.W.3d 526, *reh. den.*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) 7

State v. Sullivan, 340 Ark. 318-A, 16 S.W.3d 551 (2000) .. 8,9,10,12,13,15,16,18,20,24

State v. Varnado, 582 N.W.2d 886 (Minn. 1998) 15

Thompson v. State, 42 Ark. App. 254, 856 S.W.2d 319 (1993) 11

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 14, 22, 23

United States v. Chadwick, 433 U.S. 1 (1977) 21

United States v. Lefkowitz, 285 U.S. 452 (1932) 11

United States v. Leon, 468 U.S. 897 (1984) 10

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 14, 22

Vance v. Terrazas, 444 U.S. 252 (1980) 17

Whren v. United States, 517 U.S. 806 (1996) .. 1,2,7,8,12,13,14,15,16,17,18,21,23,24,26,27

Constitutional Provisions:

Fourth Amendment 13, 17, 20, 21, 26

Ark. Const., art. 2, §15 11

Statutes and Rules:

Ark. Code Ann. § 5-1-108 18

Ark. Code Ann. § 5-4-201 18

Ark. Code Ann. § 5-73-120 ..... 4, 6

Ark. Code Ann. § 27-22-104(c) 3

Ark. Code Ann. § 27-50-301 18

Ark. Code Ann. § 27-50-302 18

Ark. Code Ann. § 27-51-201(a)(1) 18

Ark. R. Crim. P. 4.1(a)(iii) 2, 9, 14, 18, 19, 20, 23, 24, 1-A

Ark. R. Crim. P. 13.2(c) 9, 10

Ark. R. Crim. P. 16.2 ..... 2, 13, 19, 1-A, 2-A

U.S. S.Ct. Rule 14.1(a) 17

U.S. S.Ct. Rule 15.2(b) 17

Other Authorities:

H.R. Rep. No,. 171(I), 102d Cong., 1st Sess. 32 (1991), reprinted in 1992 U.S.C.C. & A.N. 1526 17

Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 Am. J. Crim. L. 627 (1997) 16

U.S. Dept. of Transportation, National Maximum Speed Limit– Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics table 1 (Oct. 1995) 17

In The
United States Supreme Court

STATE OF ARKANSAS,

Petitioner,

v.

KENNETH ANDREW SULLIVAN,

Respondent.

ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

The respondent, Kenneth Andrew Sullivan, respectfully requests that this Court deny the petition for writ of certiorari because there are adequate and independent state grounds for the Arkansas Supreme Court's judgment, and thus this case does not implicate this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). Alternatively, respondent requests that this case be held in abeyance for determination after the impending decision in *Atwater v. City of Lago Vista*, No. 99-1408, argued December 4, 2000, and grant the writ instead on the questions presented by respondent which implicate *Atwater*. Respondent submits that this case falls in between *Atwater* and *Whren*, involving a pretextual arrest for a non-jailable traffic violation, a pretextual demand for documents to facilitate a plain view search, and the pretextual addition of an insupportable misdemeanor charge,

which implicate the reasonableness clause of the Fourth Amendment, an issue not fully addressed in *Whren* and potentially involved in *Atwater*.

RULES INVOLVED

Ark. R. Crim. P. 4.1(a)(iii) on arrest is reproduced in the Appendix at 1-A.

Ark. R. Crim. P. 16.2 on motions to suppress is reproduced in the Appendix at 1-A--2-A.

STATEMENT OF THE CASE

A. Respondent's version of the facts

This case all started because respondent Sullivan was observed by Officer Joe Taylor of the Conway, Arkansas, Police Department allegedly speeding downhill on Skyline Drive (U.S. 65) in Conway on November 18, 1998. Off. Taylor was "assigned to the narcotics section as a drug interdiction officer" whose primary function as a law enforcement officer was to "[f]ind dope." (R. 48) Taylor clocked Sullivan on radar going 40 m.p.h. downhill (R. 39-40) in a 35 m.p.h. zone. Off. Taylor testified that he also could tell from the side of the road that Sullivan's "eyebrow" window tinting was about an inch longer than the five inches allowed under Arkansas law.[1]

---

1. Off. Taylor conceded that, upon closer inspection, the window tinting was of a legal size in the windshield's center, but that toward the door posts it was illegal by an inch-and-a-half to an inch-and-a-quarter. (R. 52) The officer's testimony concerning whether he intended to arrest Sullivan for driving a vehicle with an improper window tint is in conflict. *Compare* (R. 42: "I advised him that he was being placed under arrest for carrying a weapon, no insurance, no vehicle registration. His vehicle was unsafe since he could not tell what speed that [sic] he was traveling.") *with* (R. 46: "Speeding, improper tint, no registration, no proof of insurance, and in my opinion his vehicle was unsafe.") No charge of having an illegally tinted window is present in the record. (R. 3-4).

As luck would have it, Sullivan then pulled into a gas station just past where the officer was sitting, got out of his old Ford Bronco, and walked up to the gas pump. (R. 40, 52, 53) The officer pulled in behind him without ever turning on his blue lights. (R. 50) While Sullivan was standing where "the gas nozzle is on the vehicle" (R. 53), the officer told Sullivan that he wanted to see his driver's license. (R. 41, 52) He told Sullivan why he had stopped him, and Sullivan explained that his speedometer cable was broken, and that he had a new one but had not yet been able to replace it. (R. 42) Sullivan was always cooperative (R. 50), and produced his driver's license. Officer Taylor immediately recognized Kenneth Sullivan's name from "narcotics intelligence" that the Conway Police Department had on him. (R. 50-51, 68)

At this point, Taylor asked for Sullivan's vehicle registration and proof of insurance.[2] (R. 41, 52) When Sullivan, a disabled roofer who still worked part time (R. 5, 53-54), opened the truck door to retrieve the other papers (R. 41), Taylor observed a rusting roofing tool that looked like a hatchet under the driver's seat. (R. 41-42, 53) The officer decided that, in addition to charging Sullivan with a speeding violation, he would also arrest him for possession of a weapon,[3] an offense that requires evidence that the alleged

2. Under Arkansas law, proof of registration and insurance is all available to law enforcement in the computer system of the Arkansas Department of Finance and Administration, the state's "DMV." Ark. Code Ann. § 27-22-104(c) (proof of insurance can be checked by officer through computer). Indeed, all Arkansas motorists can renew their vehicle tags online because the State has all the required information on current registration, insurance, and even county tax assessments on computer. <http://www.arstar.ihost.com.>

Off. Taylor radioed in to run Sullivan's information through the computer and got no wants or warrants. (R. 69) If there was information that suggested that the vehicle was not registered or insured, he would have learned it then.

3. Off. Taylor admitted that, had he not seen the roofer's hammer, he would have been required to issue only a citation for the speeding, registration and insurance violations. (R. 62-63) It was only the presence of the "weapon," the possession of which was a Class A misdemeanor, which required that Sullivan be brought to the station in order to be fingerprinted. (R. 63) The Conway Police Department has no policy of which Off. Taylor was aware to assist officers in determining what is and is not a weapon.

weapon be "available for use with a purpose to employ it as a weapon against a person," Ark. Code Ann. § 5-73-120(a). (R. 58) The officer admitted in his testimony, however, that nothing suggested to him Sullivan's intent to use it as a weapon (R. 61),[4] that he never even touched the roofing tool until the inventory started (R. 43), and that he had asked Sullivan for consent to search for other weapons, which was not done until the inventory (and no other "weapons" were found). (R. 55)[5]

Off. Taylor called for assistance to transport Sullivan, and he began an inventory of the vehicle as required by Conway Police Department policy. Although he testified that "this was not an overly curious stop" to him (R. 47), the inventory literally started as expeditiously as humanly possible, before any tow vehicle could have arrived, and even before the assisting officer's car taking Sullivan to jail could pull out into traffic on U.S. 65. (R. 43)[6] The officer admitted that he could not have searched the vehicle but for the

4. The trial judge expressly found that it was *not* a weapon. (R. 82) Defense counsel in the trial court argued that it was a tool of Sullivan's trade. (R. 72)

5. If the officer feared weapons, he had the authority to conduct a protective weapons search of the vehicle without petitioner's consent on reasonable suspicion. *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).

There is also somewhat of a conflict in his testimony on this score because, at another point, he testified that he did not request to look inside the vehicle. (R. 47)

6. The speed with which the officer undertook the inventory search is telling. The trial judge did not specifically comment on it, but it would seem that it had some influence on his fact finding of the reason for the arrest.

physical arrest. (R. 63) Off. Taylor found a quantity of methamphetamine and some suspected marijuana in a black bag under the armrest. (*Id.*)

B. The officer's absolute discretion in Arkansas to convert a citable stop for a non-jailable traffic offense into full custodial arrest.

The officer testified that he essentially had absolute discretion to subject any motorist stopped for any traffic offense to a custodial arrest on his whim:

> Q. What factors, if any, do you take into consideration when you make a stop of whether you're going to issue a citation or make a physical arrest?
>
> A. There are several; how busy the day has been, what the productivity has been like, if I have written several citations or if I haven't, attitude of the individual I've stopped, and what laws have been broken here.
>
> . . .
>
> If you're implying as to if there's a quota, no. . . . If I'd been basically working for five hours or four hours and haven't done anything there at all, been what some folks might–would characterize as being lazy, not doing anything, it's–I like to go out and work.
>
> So if Mr. Sullivan had been the first or the second or forth [*sic*] individual that I had stopped that day, I'm basically fixing to end up the day with some activity right there. If I had stopped someone else before him right there, and they had this very same thing, then they may have been the one to have gone to jail there.
>
> [. . .]
>
> Q. . . . I'm talking about the difference between issuing a citation and a physical arrest.
>
> A. If I stop someone for speeding or anything, that's something I can let go with a citation. (bracketed material added) (R. 57-58)

He further testified that Conway Police Officers are to issue citations for all misdemeanors as a matter of Departmental policy, but that for class A misdemeanors, the offender has to be fingerprinted and processed before being cited. (R. 62-63) So, the physical arrest naturally evolves into an inventory (R. 63) even though the offender will shortly be released on a citation and could shortly return and retrieve his vehicle, which the officers in Conway, Arkansas do not permit.

C. The trial court's holding and the Arkansas Supreme Court's affirmance

The trial judge suppressed the search finding it unreasonable. The trial judge found that, while the "stop" was lawful, because it was based upon probable cause from the radar reading, the officer's decision to arrest rather than cite Sullivan because of the drug intelligence information was problematic. The trial judge found that the arrest was made only because the officer had determined to charge Sullivan with possession of the weapon, an offense for which he held there was simply no probable cause:

> He testified that once he got him stopped, he recognized him as someone that he had seen intelligence on regarding narcotics, and he– rather than write citations, he physically arrested him. And then the weapons charge, I think, was just added to that. And I don't believe that in this particular instance that the– that that was appropriate, and I'm going to grant the defendant's motion to suppress the evidence seized as a result of the search. (R. 81)

The State then specifically sought and was refused a ruling by the trial judge that the roofing tool at issue could constitute a "weapon" under Ark. Code Ann. § 5-73-120(a),[7] although he admitted it had a blade such that in theory it qualified as a "knife."

> MR. CLARK: Okay. . . . [W]ould the Court make a finding that that does meet the definition of a knife pursuant to the statute? Is there any question in the Court's mind about that?

---

7. Ark. Code Ann. § 5-73-120(a-b) provide:

> (a) A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person.
>
> (b) As used in this section, unless the context otherwise requires:
>
> . . . .
>
> (2) "Knife" means any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting or stabbing. It includes a dirk, sword or spear in a cane, razor, ice pick, and a throwing star, switchblade, and butterfly knife[.]

THE COURT: That it meets the definition of a knife?

MR. CLARK: Yes, being a bladed weapon capable of–or a hand instrument–any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting.

THE COURT: Under the circumstances of this case, I don't think I can find that that's a weapon. (R. 81-82).

All the findings of fact on the search and pretext were found not to be clearly erroneous by the Arkansas Supreme Court. *State v. Sullivan*, 340 Ark. 315, 318, 11 S.W.3d 526, 528 (not against the preponderance of the evidence), *reh. den.*, 340 Ark. 318-A, 16 S.W.3d 551 (2000). The Arkansas Supreme Court also held that it would not sanction using the traffic laws to search any vehicle the officers wanted. *Id.*:

> The question then becomes whether appellee would have been *arrested* simply for traveling forty miles per hour in a thirty-five mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, appellee was never *charged* with having no proof of insurance or vehicle registration. Further, the trial court, when assessing the credibility of Officer Taylor (the sole witness at the hearing), the totality of the circumstances, and the applicable law, agreed with appellee that the search and seizure was pretextual and should be suppressed. Clearly, a review of the applicable law illustrates that the issue of pretext necessarily turns on the facts in a given case, and given our standard of review in these cases, we cannot say that the trial court's ruling was against the preponderance of the evidence.

D. How *Whren v. United States* came into the case on rehearing

The tortured path of this case to this Court and the State's Question Presented on application of *Whren v. United States*, 517 U.S. 806 (1996), to these facts by the Arkansas Supreme Court is underscored by the fact that nobody bothered to cite *Whren* in this case until the petition for rehearing in the Arkansas Supreme Court. Respondent's counsel

never cited it (or even tried to explain it away), and with apparent justification since prior Arkansas cases on pretext at least allowed his argument. The State did not cite it in its Response to the Motion to Suppress (R. 27), its argument to the trial court, or its brief in the Arkansas Supreme Court (Appt's Brief, CR99-1140, filed Nov. 18, 1999). In short, everyone was content to rely on Arkansas cases until the Arkansas Supreme Court ruled.

After the State lost in the Arkansas Supreme Court, it complained that the Court had committed a "a significant error of law" by not applying a case no one had bothered to cite to it. (Pet. for Rehearing, filed Feb. 17, 2000 at 1-2). The Arkansas Supreme Court mentioned this oversight. *State v. Sullivan*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) (supplemental opinion on rehearing) ("The State presents us with the *Whren* case for the first time on rehearing and argues that, under *Whren*, a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime.") & *id.* at 318-D, 16 S.W.3d at 553 (dissenting opinion) ("It is true that our opinion did not discuss *Whren*, but only because that case was neither cited nor argued to this court.")

In the original unanimous opinion handed down February 10, 2000, the Arkansas Supreme Court affirmed the trial court's finding that the search was unreasonable because the arrest was pretextual. 340 Ark. at 318, 11 S.W.3d at 528 (quoted *supra*). On rehearing, the Arkansas Supreme Court divided 4-3 on application of *Whren*, but the majority still granted great deference (as it should) to the trial judge's findings. 340 Ark. at 318-C, 16 S.W.3d at 552-53:

Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more stringent requirements for nighttime searches than Court decisions. See Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

In sum, we will not give carte blanche approval for all pretextual arrests for traffic violations, as the State would have us do. We draw a clear distinction between arresting a person with crack cocaine in his hands as was the case in *Whren* and effecting a pretextual arrest for purposes of a search, such as we have in the instant case. Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment. *See State v. Holmes, supra.* We will decide the reasonableness of the arrest and search on a case-by-case basis, as the Whren decision makes clear. For these reasons, we deny the State's petition for rehearing. (footnoted added)

Thus, the Arkansas Supreme Court upheld the trial court's finding that officers of the State did not have complete discretion to arrest a motorist rather than cite the motorist for a traffic offense just so the officer could conduct a search of the vehicle; to rule otherwise, the court reasoned, would be make the search unreasonable under the Fourth Amendment.

The three dissenting justices found *Whren* controlling and added that a custodial arrest was valid for any traffic offense under Ark. R. Crim. P. 4.1(a)(iii) "which states that 'a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed . . . *any* violation of law in the officer's presence.' (Emphasis added.)" 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

REASONS FOR DENYING THE WRIT

I. The Decision of the Arkansas Supreme Court, However Inartfully Stated, Is Based on Adequate and Independent State Grounds in Interpreting State Law; Certiorari Should Thus Not Be Granted.

The Arkansas Supreme Court's opinion on rehearing cited *Arkansas law* for the proposition that it could provide greater protections for a criminal defendant than are afforded under the federal constitution. 340 Ark. at 318-C, 16 S.W.3d at 552-53 ("*See* Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991)"). Ark. R. Crim P. 13.2(c) affords Arkansas citizens greater protections from nighttime searches than does the Fourth Amendment, a point which *Garner v. State* made clear. Indeed, in *Garner*, the Arkansas Supreme Court had expressly declined to apply the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), to a nighttime search warrant issued without a factual basis: "Our concern today is for the integrity of our Rules." *Garner v. State*, 307 Ark. 353, 359, 820 S.W.2d 446, 450 (1991) (emphasis supplied).

But *Garner* was not the first nighttime search case in which the Arkansas Supreme Court had construed Arkansas Rules of Criminal Procedure to provide citizens greater protections from improperly authorized nighttime searches than does the Fourth Amendment. In fact, it had done so consistently, having rejected in 1980 the argument that it should follow any federal standard.[8] By relying on *Garner*, the Arkansas Supreme Court's

8. Arkansas has consistently held its nighttime search rule to be so fundamental that a substantial violation of the rule cannot be saved by the good faith exception under *Leon*. *See, e.g.*,

opinion on rehearing in this case thus referenced a *state* rule of criminal procedure, and a *state* law decision, which itself had emphatically rejected applying a federal constitutional standard, and which reflected an independent *state* constitutional standard that was two decades old. Reliance on *Garner* is all that is required.

That the issue was presented as a matter of state law at the hearing and in the original briefs in the Arkansas Supreme Court and on rehearing is hardly surprising; both parties and the trial court had always analyzed it as such. Respondent in the trial court grounded his motion to suppress on the Arkansas Constitution,[9] the federal constitution, and the Arkansas Rules of Criminal Procedure. (R. 19) He cited exclusively *state* cases (one of which referenced a 1932 U.S. Supreme Court opinion[10]), for the proposition that

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Fouse v. State, 337 Ark. 13, 21-23, 989 S.W.2d 146, 150-51 (1999) (quoting *Garner*, 307 Ark. at 358-59, 820 S.W.2d at 449-50, and the reference to "our Rules, but also by our state and federal constitutions."); *Langley v. State*, 66 Ark. App. 311, 314, 990 S.W.2d 575, 577 (1999); *Richardson v. State*, 314 Ark. 512, 519, 863 S.W.2d 572, 576 (1993); *Thompson v. State*, 42 Ark. App. 254, 259, 856 S.W.2d 319, 321 (1993); *Carpenter v. State*, 36 Ark. App. 211, 214, 821 S.W.2d 51, 53 (1991); *State v. Martinez*, 306 Ark. 353, 356-57, 811 S.W.2d 319, 321 (1991); *Hall v. State*, 302 Ark. 341, 344, 789 S.W.2d 456, 458-59 (1990).

In fact, the Arkansas Supreme Court first held that the violation of its nighttime search rule was "substantial" for state exclusionary rule purposes four years *before Leon* was decided in *State v. Broadway*, 269 Ark. 215, 217-18, 599 S.W.2d 721, 723 (1980). In *Broadway*, the Arkansas Supreme Court held that evidence would be suppressed if the search violated the Fourth Amendment, the Arkansas Constitution, art. 2, § 15, or Ark. R. Crim. P. 16.2 (requiring suppression only if the violation was "substantial"). *Broadway*, 269 Ark. at 217-18, 599 S.W.2d at 723. The Arkansas Supreme Court explicitly rejected the State's reliance on federal cases on that point. *Id.* at 217, 599 S.W.2d at 723. Chief Justice Fogleman dissented on the ground that the court should start with the Fourth Amendment in construing Rule 16.2; *id.* at 218-19, 599 S.W.2d at 724; something the majority expressly declined to do.

9. The motion cited generally Ark. Const., art. 2, but the search and seizure provision is art. 2, § 15.

10. *United States v. Lefkowitz*, 285 U.S. 452 (1932).

there was "no reasonable basis to believe that the roofing hammer/hatchet was to be used as a weapon." (R. 23) The State's four sentence response in the trial court cited the *state* Constitution, the *state* rules of criminal procedure, and a single *state* case, as well as the "Constitution of the United States of American [*sic*]." (R.27) On appeal, respondent cited exclusively *state* cases, three rules of *state* criminal procedure, and the Arkansas and federal constitutions in his brief in the Arkansas Supreme Court. (Appee's brief, No. CR99-1140, at 14-15). The State cited *state* law, *state* rules of criminal procedure, and a single *state* case in its brief. It simply defies credulity to suggest that a case injected only after two courts had ruled against the State, after argument and briefing of the matter *twice*, somehow was the basis for the decision of the Arkansas Supreme Court.

The Arkansas Supreme Court simply held that it could consider, in assessing the absence of probable cause for an arrest, the fact that the arrest was pretextual. Nothing in *United States v. Whren* precludes this. Moreover, it is also indisputable that the *Arkansas* Supreme Court is free to interpret the *Arkansas* Constitution and the *Arkansas* Rules of Criminal Procedure as more protective of an individual's rights than is the federal constitution, and is the obvious intended point in the opinion's paragraph which specifically references a well-established principle of *state law* and *state* rules of criminal procedure:

> Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more

stringent requirements for nighttime searches than Court decisions.[11]

340 Ark. at 318-C, 16 S.W.3d at 552. The proposition that this Court's interpretation of the federal constitution is binding upon the courts of the several states hardly merits a grant of certiorari. Respondent would submit that it is not only generally known, but that it is also known to the Arkansas Supreme Court.

The mere fact the Arkansas Supreme Court cites *Garner* shows that its decision was grounded on Ark. R. Crim. P. 16.2 and not the Fourth Amendment.

II. As Decided by the Arkansas Supreme Court, this Case Does Not Implicate *United States v. Whren*, and Thus Certiorari Should Not Be Granted.

The Arkansas Supreme Court rested its opinion on rehearing on the ground that *Whren* did not preclude a pretextual arrest being found unreasonable because it lacked probable cause. In *Whren*, the Court unanimously "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 812. The stop in this case, however, was never alleged to be pretextual. The determination that there was probable cause to charge a roofer with possession of a weapon (to wit, a roofer's hammer, a normal tool of respondent's trade) was found to be legally unsupportable and factually pretextual on the rather simple record in this case.

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11. Perhaps the Arkansas court misspoke and said "U.S. Constitution" and not the "Arkansas Constitution." Nevertheless, the reference to *Garner v. State* should eliminate any ambiguity.

That *Whren* forecloses inquiry into the subjective motivations of the arresting officer as a facial basis for suppression does not mean that it forecloses inquiry into whether the arresting officer had probable cause for his actions. In fact, in *Whren*, this Court distinguished cases in which searches had proceeded without probable cause as ones in which subjective motivations were appropriate constitutional considerations. *See Whren*, 517 U.S. at 818 (citing *Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (checkpoint stops), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrol stops) as all distinguishable "because they involved seizures without probable cause").

Similarly, this Court just held that the *Whren* limitation on subjective intent did not foreclose inquiry into "programmatic purposes [which] may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *City of Indianapolis v. Edmunds*, 531 U.S. __, __ (slip op. at 13), 2000 WL 1740936, 2000 U.S. Lexis 8084 (No. 99-1080; Nov. 28, 2000). Here, there is a strong inference that the trial judge was concerned with Off. Taylor's being assigned to a Drug Interdiction Unit with the primary purpose of "find[ing] dope." Hence, he found *as a fact* that the custodial arrest pretextual for a drug search. Under *Whren*, it would seem on the surface that an individual officer's actions are not "programmatic." However, in this case, the officer has the programmatic ability, sanctioned by Ark. R. Crim. P. 4.1(a)(iii), as he testified, to make a custodial arrest in any traffic stop that he conducts, *completely on his individual whim*. That is a scary thought.

Even if this Court were to conclude that *Whren* was somehow implicated by the Arkansas Supreme Court's consideration of the pretextual nature of the charge in determining probable cause, *Whren* is factually different than this case, as the Arkansas Supreme Court recognized in distinguishing it. In *Whren*, the officer approached the car after the traffic stop and observed drugs in plain view in the occupant's lap. In this case, the officer engaged in a pretextual arrest to conduct an inventory which produced the drugs. 340 Ark. at 318-C, 16 S.W.3d at 552-53. There has to be a constitutional difference between the two, and this case gives the Court the chance to articulate it.

The closest parallel case to this one is *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998), where the Minnesota Supreme Court distinguished *Whren* and held that a pretextual traffic stop upon entering "a parking lot of an apartment complex known for drug trafficking" (*id.* at 888) for a cracked windshield led to the driver being frisked before being placed in the police car was unreasonable because the officers had no reason to believe that weapons or contraband would be found. *Id.* at 892. The Minnesota court had previously held that a pretextual inventory violated the Fourth Amendment in *State v. Holmes*, 569 N.S.2d 181, 188 (Minn. 1997) ("the [*Whren*] Court noted it would not uphold as valid police attempts to use the objective basis for an inventory search as a pretext for a purely investigatory search."). (In neither of these cases did the State of Minnesota seek review in this Court.)

The Washington Supreme Court has rejected *Whren* under its State Constitution. *State v. Ladson*, 138 Wash. 2d 343, 357-58, 979 P.2d 833, 842 (1999). The Washington

Supreme Court further noted that it would not permit its citizens to sacrifice their rights simply upon entering a car; 138 Wash. 2d at 358 n. 10, 979 P.2d at 842 n. 10:

> We note if we were to depart from our holdings and allow pretextual traffic stops, Washington citizens would lose their privacy every time they enter their automobiles. The traffic code is sufficiently extensive in its regulation that "[w]hether it be for failing to signal while changing lanes, driving with a headlight out, or not giving 'full time and attention' to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997) (footnote omitted). Thus, nearly every citizen would be subject to a *Terry* stop simply because he or she is in his or her car. But we have repeatedly affirmed that Washingtonians retain their privacy while in the automobile and we will do so today. *See City of Seattle v. Mesiani*, 110 Wash.2d 454, 456-57, 755 P.2d 775 (1988) ("From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.") (citing *State v. Gibbons*, 118 Wash. 171, 187, 203 P. 390 (1922)).

See also People v. Dickson, 180 Misc.2d 113, 117-18, 690 N.Y.S.2d 390, 393 (N.Y. County 1998) (holding traffic stop pretextual and noting *Whren;* until New York Court of Appeals applies *Whren*, existing state law on the intent of the officers must be followed; "the *Whren* Court did not view its pronouncement as constituting a new federal standard"; New York likely will not follow it).

This case reached a similar conclusion, and the judgment of the Arkansas Supreme Court is entitled to constitutional deference.

III. Summary Reversal Is Unwarranted Because of the Nature of the Issues; Instead, If the Court Grants Certiorari at All, it Should Include the Issues Presented by Respondent.

As stated in his Statement of the Case, *supra*, at 1-2, respondent submits that this case falls in between *Whren v. United States* and *Atwater v. City of Lago Vista*. Summary reversal is, therefore, completely unwarranted.

Indeed, if the Court chooses to grant certiorari, it should include the Questions Presented by respondent as well because they are all "fairly included" within the issues presented by the State of Arkansas's certiorari petition, and they are reasons to defend the judgment of the Arkansas Supreme Court. S.Ct. Rule 14.1(a) & 15.2(b); *Robinette v. Ohio*, 419 U.S. 33, 38 (1996) (citing *Vance v. Terrazas*, 444 U.S. 252, 248-59 n. 5 (1980)).

REASONS FOR GRANTING THE WRIT

I. A Pretextual, Warrantless Arrest for a Non-Jailable Traffic Violation Violates the Fourth Amendment, So Certiorari Should Be Granted and this Case Decided in Light of *Atwater v. City of Lago Vista*.

Before Officer Taylor made the pretextual demand of Sullivan for proof of insurance and registration, he had probable cause to charge him with speeding five miles an hour over the limit, even though it is universally recognized that motorists are given a five to ten mile per hour tolerance.[12] Speeding five miles an hour over the speed limit, in Arkansas, is an

12. U.S. Dept. of Transportation, National Maximum Speed Limit–Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics table 1 (Oct. 1995); H.R. Rep. No,. 171(I), 102d Cong., 1st Sess. 32 (1991), reprinted in 1992 U.S.C.C. & A.N. 1526, 1558 ("the average motorist expects a 5 to 10 mile per hour tolerance by law enforcement personnel").

Both were cited in the petitioners' briefs in *Atwater v. City of Lago Vista*, No. 99-1408,

unspecified "violation," under Ark. Code Ann. § 27-51-201,[13] and as such is punishable by at most a fine of $100.[14] If a physical arrest could be made for this violation alone, then Sullivan could have been removed from his vehicle at this point, and it could have been inventoried, making any subsequent unconstitutional search moot. Noting that such a practice would convey extraordinary discretion to officers in the field, the majority of the Arkansas Supreme Court on rehearing ruled that this result would "fly in the face of reasonableness, which is the essence of the Fourth Amendment. *See* State v. *Holmes*, supra." 340 Ark. at 318-C, 16 S.W.3d at 553.

Nevertheless, the three dissenting justices on the Arkansas Supreme Court not only found *Whren* controlling, but also found that a custodial arrest was valid for *any traffic offense* under Ark. R. Crim. P. 4.1(a)(iii) "which states that 'a law enforcement officer may

Petitioner's Brief at 20-21 (Sept. 11, 2000), and *Whren v. United States*, No. 95-5841, Petitioner's Brief (Feb. 16, 1996).

13. Ark. Code Ann. § 27-51-201(a)(1) provides: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

14. Ark. Code Ann. § 27-50-301 provides: "Any moving traffic law violation not enumerated in § 27-50-302 shall be known as a violation as defined in Arkansas Criminal Code, §§ 5-1-105 and 5-1-108, and shall be punishable as provided under § 5-4-201." None of the offenses respondent were stopped for are listed in § 27-50-302, so they are punishable by fine only.

Section 5-4-201 lists only fines as punishments, and "violations," unlike felonies and misdemeanors, are not subject to any possible incarceration. *See* Ark. Code Ann. § 5-1-108, defining violations:

> (a) An offense is a violation if it is so designated by this code or by a statute not a part of this code.
>
> (b) Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of this code if the statute defining the offense provides that no sentence other than a fine, or fine or forfeiture, or civil penalty is authorized upon conviction.

arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed . . . *any* violation of law in the officer's presence.' (Emphasis added.)"[15] 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

This statement in the dissenting opinion is essentially the issue before his Court in *Atwater v. City of Lago Vista,* No. 99-1408, *supra.* The State disclaims any reliance on *Atwater* because respondent did not rely on the Rule 4.1(a)(iii) issue below. (Pet. Cert. at 3-4, n. 1)

Since, however, the dissent discussed Rule 4.1(a)(iii) and said it was binding and supported this arrest, then the majority below must have rejected that interpretation on reasonableness grounds. Therefore, respondent submits that the constitutionality of Rule 4.1(a)(iii) must be fairly included within the Questions Presented and respondent will assert that it is unconstitutional when applied to *any* traffic offense, the issue in *Atwater v. City of Lago Vista, supra,* since the petitioner relies on Rule 4.1(a)(iii) and *Whren.*

The State simply cannot have it both ways. Either the Arkansas Supreme Court impliedly held that Rule 4.1(a)(iii), if interpreted to permit a full custodial arrest for a minor traffic offense, would be unreasonable and thus would violate the Fourth Amendment, or it held that Arkansas' own constitutional reasonableness requirement invalidated the arrest and consequent inventory under Rule 16.2. The first alternative brings this case squarely within the issue presented by *Atwater*–indeed in a way an even more egregious version of the problem presented by *Atwater*–since this was a *pretextual* arrest, rather than

15. The full text of Ark. R. Crim. P. 4.1 is reproduced in the Appendix at 1-A.

a citation for a minor traffic offense, made just so the officer could look for drugs. The second alternative, as respondent has argued, presents an adequate and independent, albeit inartfully expressed, state ground for the judgment, and is thus a proper basis to deny the State's petition for certiorari.

A. Granting Unbridled Discretion to a Law Enforcement Officer to Make a Custodial Arrest to Facilitate an Inventory Search is Unreasonable under the Fourth Amendment.

This Court has always been leery of granting law enforcement officers unbridled discretion. And, granted, much discretion is necessary for them to do their jobs. But, what happens when absolute discretion collides with the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"? This Court usually comes down on the side of restraining discretion to protect the people. Here, that discretion was used to effect an arrest to make a search of respondent's car.

1. The officer's suppression hearing testimony as to his discretion

At the suppression hearing, the officer testified that he had the discretion to arrest whomever he wanted for any traffic offense. (R. 57-58, 62-63) The State agrees, and it cites Ark. R. Crim. P. 4.1(a)(iii) in support of this conclusion (Pet. Cert., at 3, n. 1), as did the dissenters in the Arkansas Supreme Court below. 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

2. The Fourth Amendment's reasonableness inquiry

The first clause of the Fourth Amendment protects us against "unreasonable searches and seizures." Reasonableness is the "fundamental inquiry" in Fourth Amendment

cases. *See, e.g., Cady v. Dombrowski,* 413 U.S. 433, 439 (1973); *United States v. Chadwick,* 433 U.S. 1, 9 (1977); *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987). It has also been called the "touchstone" of the Fourth Amendment. *Robinette v. Ohio,* 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno,* 500 U.S. 248, 250 (1991) (citing *Katz v. United States,* 389 U.S. 347, 360 (1967)) (reasonableness is "contextual and not subject to bright-line rules")); *Whren,* 517 U.S. at 813.

One aspect of the reasonableness is the necessity of checking or limiting the discretion of government officers in the field.

3. This Court's distrust of unbridled discretion in law enforcement officers

This Court has always shown that it is leery of granting unbridled discretion in a law enforcement officer to conduct seizures and then searches, no matter what the context.

In *Delaware v. Prouse,* 440 U.S. 648, 660 (1979), this Court held that random vehicle seizure for driver's license checks was unreasonable under the Fourth Amendment. The Court held that stops, *i.e.*, seizures of the vehicle and driver, could not be based on "the unbridled discretion of law enforcement officials." There has to be limits on the exercise of this discretion. *Id.:*

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations–or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered–we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. *Almeida-Sanchez v. United States,* 413 U.S. 266, 270 (1973); *Camara*

v. Municipal Court, 387 U.S., at 532-533.

This Court just reaffirmed this language in *City of Indianapolis v. Edmond, supra,* slip op. at 6, where it quoted from the last part of the above quote from *Prouse* that "The officer's conduct in that case was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.' 440 U.S. at 661."

Likewise, in *Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978), a police officer shooting case where the State of Arizona argued for a murder scene exception to the warrant requirement, this Court held that the lower court's limits on the officer's discretion to conduct a murder scene search did not go far enough: "The confer unbridled discretion upon the individual officer to interpret such terms as 'reasonable . . . search' . . . ." The Court held that those limits did nothing to protect against arbitrary searches and seizures, and those judgments had to be made by a neutral and detached magistrate." *Id.* at 395.

Even in the area of administrative searches, this Court has been concerned with grants of unbridled discretion of inspectors to enter property; *Marshall v. Barlow's Inc.,* 436 U.S. 307, 323 (1978) (quoted in *Donovan v. Dewey,* 452 U.S. 594, 599 (1980), and followed in *New York v. Burger,* 482 U.S. 691, 703 (1987)); or order urine tests. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 622 (1989) (regulations provided limits on discretion and protected against abuse of discretion).

In *United States v. Brignoni-Ponce,* 422 U.S. 873, 882-83 (1975), the Court also mentioned the "unlimited interference with the use of the highways" that roving patrol stops created, and it followed in *United States v. Martinez-Fuerte,* 428 U.S. 543, 559

(1976), stating that *Brignoni* was based on fears that "[t]here was also a grave danger that such unreviewable discretion would be abused by some officers in the field."

"[S]tandardless and unconstrained discretion" is exactly what this case involves, and the grant of this discretion by Rule 4.1(a)(iii) and the unbridled exercise of this discretion to conduct a pretextual arrest when a citation should do makes all the constitutional difference.

This finding of pretext shows that this stop, arrest, and inventory search was "in the end to advance 'the general interest in crime control.' *Prouse*, 440 U.S., at 659 n. 18. . . . We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *City of Indianapolis v. Edmund, supra,* slip op. at 11.

B. *Whren, Atwater,* and absolute discretion.

Whren v. United States does not deal with officer's discretion. Indeed, the entire premise of the *Whren* is that there was an objectively reasonable basis for a *stop* that lead to a *plain view* of drugs in the hands of the occupants of the car when he walked up. *Atwater* does deal with officer's discretion: his discretion to make a custodial arrest for any traffic offense he chooses. Here, we have an objectively reasonable basis for the stop, but we have absolute discretion as to whether the respondent or any other citizen would be subjected to a custodial arrest rather than a citation. In addition, the officer knew that the custodial arrest permitted an inventory of the vehicle. (R. 63)

Thus, this case falls between *Whren* and *Atwater,* and it is not controlled by either.

Summary reversal on *Whren*, as the State requests, is improper.

C. Thus, Ark. R. Crim. P. 4.1(a)(iii) violates the Fourth Amendment.

Ark. R. Crim. P. 4.1(a)(iii) grants law enforcement officers unbridled discretion to subject *any* motorist to a custodial arrest for *any* traffic offense. Respondent contends that this unbridled discretion in a law enforcement officer violates reasonableness requirement of the Fourth Amendment.

While the State disclaims any relevance of this issue to this case (Pet. Cert. at 3 n. 1), the facts remain that the State raised Rule 4.1(a)(iii) in support of its position below (Appt's Brief, No. CR99-1140, at 4), and the dissenters in the Arkansas Supreme Court relied upon it in concluding that rehearing should be granted. (340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion)). Respondent submits, however, that the constitutionality of Rule 4.1(a)(iii) is before the Court as "fairly included" within the Petition because it may be used to defend the result below.

II. The Court Has Previously Recognized in Dicta That a Vehicle Inventory May Be Pretextual, and, If Certiorari Is Granted, the Court Should Hold Pretextual Inventories Unreasonable.

A. The Court Has Repeatedly Suggested That a Vehicle Inventory Done Merely as a Pretext to Generally Investigate Crime Might Violate the Fourth Amendment.

In *Colorado v. Bertine,* 479 U.S. 367 (1987), the Court dealt with a vehicle inventory after a DWI arrest. The Court stressed that "there was no showing that the police, who were following standardized procedures, acted in bad faith of for the sole purpose of

investigation." *Id.* at 372. At the end of the majority opinion, the Court concluded that "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *Id.* at 376.

Similarly, in the inventory case of *Florida v. Wells*, 495 U.S. 1, 4 (1995), the Court stressed that the requirement of standardized procedures

> is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discovery incriminating evidence. . . . The individual police officer must not be allowed so much latitude that inventory searches are turned into a "purposeful and general means of discovering evidence of crime." *Bertine*, supra, at 376 (BLACKMUN, J., concurring).

In the administrative search case of *New York v. Burger*, *supra*, the Court sustained the search there because the regulatory scheme protected against unchecked discretion. The Court added one caveat, however, *id.* at 726 n. 27, "There is, furthermore, no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme."

Here, we have a finding of fact already sustained by the Arkansas Supreme Court that brings the inventory of respondent's vehicle squarely within the questions reserved in *Bertine* and *Wells*. This is an important question, and it happens every day in this country. Certiorari should thus be granted to resolve this important Fourth Amendment question.

B. The Trial Court's Finding of Fact That the Arrest Occurred to Facilitate the Inventory Is Entitled to Deference on Appeal and Certiorari.

The trial court found as a fact that the custodial arrest and search was pretextual, and the Arkansas Supreme Court affirmed that finding in its original opinion. 340 Ark. 315,

318, 11 S.W.3d 526, 528 (2000). The decision on rehearing changed nothing on this score. The finding of the trial judge, who has presumably seen this officer testify before, is entitled to great weight. "[W]e hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (decided two weeks before *Whren*).

The trial court found the search unreasonable because the arrest was unreasonable to facilitate an inventory, and the Arkansas Supreme Court said that was not against the preponderance of the evidence. 340 Ark. at 318, 11 S.W.3d at 528.

The facts as found by the trial court align this case more closely with *Atwater* than *Whren*. The officer used his discretion to make a pretextual custodial arrest. If respondent had only been cited by this drug interdiction officer, the officer would not have been able to conduct a search incident. *Knowles v. Iowa*, 525 U.S. 113 (1998). With a custodial arrest, however, the entire passenger compartment could have been searched under *New York v. Belton*, 453 U.S. 454 (1981), or the officer could tow the vehicle and inventory it under the Conway Police Department's inventory policy, *Florida v. Wells*, *supra*, rather than just pull it aside on the convenience store lot, even though respondent would have been released on a citation in short order after fingerprinting.[16]

Here, that is exactly what happened.

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16. Respondent recognizes that this Court has said that the "the existence of alternative 'less intrusive measures'" is not required in the reasonableness inquiry; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *Bertine*, 479 U.S. at 375-76; but it should still weigh heavily when pretext has already been found by the trial court and the appellate court below.

CONCLUSION

The Arkansas Supreme Court decided that probable cause for the misdemeanor weapons charge was not made out in this case, in part because it concluded–as had the trial court–that this charge had been added merely as a pretext to inventory the vehicle. It made this determination based upon an application to the facts of state law, expressed in its state rules of criminal procedure and a state court decision. This is a wholly adequate and utterly independent state law ground for the decision, notwithstanding the State's effort to shoehorn into the matter a federal constitutional case at the eleventh hour.

Moreover, there is a significant factual difference between the facts of this case and *Whren*, and the highest court of another state is in accord with Arkansas on similar facts. Therefore, certiorari should be denied.

If certiorari is granted, it should be to determine whether the facts of this case require a different result under *Atwater* or because the vehicle inventory in this case was pretextual under *Bertine* and *Wells*.

Respectfully submitted,

JOHN WESLEY HALL, JR.*
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

DAVID M. SIEGEL
New England School of Law
154 Stuart Street
Boston, Massachusetts 02116
(617) 422-7270
Attorneys for Respondent
**Counsel of Record*

APPENDIX

Arkansas Rules of Criminal Procedure Relied Upon

RULE 4.1. Authority to Arrest Without Warrant.

(a) A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

(i) a felony;

(ii) a traffic offense involving:

(A) death or physical injury to a person; or

(B) damage to property; or

(C) driving a vehicle while under the influence of any intoxicating liquor or drug;

(iii) any violation of law in the officer's presence;

(iv) acts which constitute a crime under the laws of this state and which constitute domestic abuse as defined by law against a family or household member and which occurred within four (4) hours preceding the arrest.

(b) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

(c) An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer or private citizen is unable to determine the particular offense which may have been committed.

(d) A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.

RULE 16.2. Motions to Suppress Evidence.

(a) Objection to the use of any evidence, on the grounds that it was illegally obtained, shall be made by a motion to suppress evidence. The phrase "objection to the use of any evidence, on the grounds that it was illegally obtained," shall include but is not limited to evidence which:

1. Consists of tangible property obtained by means of an unlawful search and seizure; or

2. Consists of a record of potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping; or

3. Consists of a record or potential testimony reciting or describing a confession or admission of a defendant involuntarily made; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two, and three; or

5. Consists of the prospective in-court identification of the defendant based on an unlawful pre-trial confrontation.

The motion shall be made to the court which is to conduct the trial at which such evidence may be offered in evidence.

(b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

(c) Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require.

(d) An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Rule 36.10.

(e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, such evidence would have been discovered; and

(vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

00-262

(5)

Per Curiam

SUPREME COURT OF THE UNITED STATES

ARKANSAS *v.* KENNETH ANDREW SULLIVAN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 00–262. Decided May 29, 2001

PER CURIAM.

In November 1998, Officer Joe Taylor of the Conway, Arkansas, Police Department stopped respondent Sullivan for speeding and for having an improperly tinted windshield. Taylor approached Sullivan's vehicle, explained the reason for the stop, and requested Sullivan's license, registration, and insurance documentation. Upon seeing Sullivan's license, Taylor realized that he was aware of "'intelligence on [Sullivan] regarding narcotics.'" 340 Ark. 318–A, 318–B, 16 S. W. 3d 551, 552 (2000). When Sullivan opened his car door in an (unsuccessful) attempt to locate his registration and insurance papers, Taylor noticed a rusted roofing hatchet on the car's floorboard. Taylor then arrested Sullivan for speeding, driving without his registration and insurance documentation, carrying a weapon (the roofing hatchet), and improper window tinting.

After another officer arrived and placed Sullivan in his squad car, Officer Taylor conducted an inventory search of Sullivan's vehicle pursuant to the Conway Police Department's Vehicle Inventory Policy. Under the vehicle's armrest, Taylor discovered a bag containing a substance that appeared to him to be methamphetamine as well as numerous items of suspected drug paraphernalia. As a result of the detention and search, Sullivan was charged with various state-law drug offenses, unlawful possession of a weapon, and speeding.

Sullivan moved to suppress the evidence seized from his vehicle on the basis that his arrest was merely a "pretext

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and sham to search" him and, therefore, violated the Fourth and Fourteenth Amendments to the United States Constitution. Pet. for Cert. 3. The trial court granted the suppression motion and, on the State's interlocutory appeal, the Arkansas Supreme Court affirmed. 340 Ark. 315, 11 S. W. 3d 526 (2000). The State petitioned for rehearing, contending that the court had erred by taking into account Officer Taylor's subjective motivation, in disregard of this Court's opinion in *Whren* v. *United States*, 517 U. S. 806 (1996). Over the dissent of three justices, the court rejected the State's argument that *Whren* makes "the ulterior motives of police officers . . . irrelevant so long as there is probable cause for the traffic stop" and denied the State's rehearing petition. 340 Ark., at 318–B, 16 S. W. 3d, at 552.

The Arkansas Supreme Court declined to follow *Whren* on the ground that "much of it is *dicta*." 340 Ark., at 318–A, 16 S. W. 3d, at 552. The court reiterated the trial judge's conclusion that "the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime," and observed that "we do not believe that *Whren* disallows" suppression on such a basis. 340 Ark., at 318–C, 16 S. W. 3d, at 552. Finally, the court asserted that, even if it were to conclude that *Whren* precludes inquiry into an arresting officer's subjective motivation, "there is nothing that prevents this court from interpreting the U. S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." 340 Ark., at 318–C, 16 S. W. 3d, at 552.

Because the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent, we grant the State's petition for a writ of certiorari and reverse.* As an initial matter, we note that the Arkansas Supreme Court never questioned Officer Taylor's authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so. See *Atwater* v. *Lago Vista*, 532 U. S. ___ (2001). Rather, the court affirmed the trial judge's suppression of the drug-related evidence on the theory that Officer Taylor's arrest of Sullivan, although supported by probable cause, nonetheless violated the Fourth Amendment because Taylor had an improper subjective motivation for making the stop. The Arkansas Supreme Court's holding to that effect cannot be squared with our decision in *Whren*, in which we noted our "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers," and held unanimously that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U. S., at 813. That *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment; indeed, *Whren* itself relied on *United States* v. *Robinson*, 414 U. S. 218 (1973), for the proposition that "a traffic-violation arrest . . . [will] not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search.'" 517 U. S., at 812–813.

The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon* v. *Hass*, 420 U. S. 714 (1975). There, we observed that the Oregon

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*Sullivan's motion for leave to proceed *in forma pauperis* is granted. We have jurisdiction under 28 U. S. C. §1257 notwithstanding the absence of final judgment in the underlying prosecution. See *New York* v. *Quarles*, 467 U. S. 649, 651, n. 1 (1984) ("[S]hould the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal").

Supreme Court's statement that it could "'interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court'" was "not the law and surely must be inadvertent error." *Id.*, at 719, n. 4. We reiterated in *Hass* that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.*, at 719.

The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ARKANSAS *v.* KENNETH ANDREW SULLIVAN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 00–262. Decided May 29, 2001

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE BREYER join, concurring.

The Arkansas Supreme Court was moved by a concern rooted in the Fourth Amendment. Validating Kenneth Sullivan's arrest, the Arkansas court feared, would accord police officers disturbing discretion to intrude on individuals' liberty and privacy. See 340 Ark. 318–A, 318–B, 16 S. W. 3d 551, 552 (2000) (expressing unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity"). But this Court has held that such exercises of official discretion are unlimited by the Fourth Amendment. See *Atwater* v. *Lago Vista*, 532 U. S. ___ (2001); *Whren* v. *United States*, 517 U. S. 806 (1996). Given the Court's current case law, I join the Court's opinion.

In *Atwater*, which recognized no constitutional limitation on arrest for a fine-only misdemeanor offense, this Court relied in part on a perceived "dearth of horribles demanding redress." 532 U. S., at ___ (slip op., at 32). Although I joined a dissenting opinion questioning the relevance of the Court's conclusion on that score, see *id.*, at __ (slip op., at 13–14) (O'CONNOR, J., dissenting), I hope the Court's perception proves correct. But if it does not, if experience demonstrates "anything like an epidemic of unnecessary minor-offense arrests," *id.*, at __ (slip op., at 33) (opinion of the Court), I hope the Court will reconsider

its recent precedent. See *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986) (observing that Court has departed from *stare decisis* when necessary "to bring its opinions into agreement with experience and with facts newly ascertained") (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)).